Editor's note: Reconsideration sua sponte; decision modified in part by 59 IBLA 343 (Nov. 5, 1981)

AMERICAN TELEPHONE
AND TELEGRAPH CO.

IBLA 81-215, 81-217
81-221, 81-259

Decided August 27, 1981

Appeals from decisions of Nevada and Wyoming State Offices, Bureau of Land Management, imposing reappraised annual rental charges for communication site rights-of-way. N-023456, et al.

Set aside and remanded; appellant ordered to pay "back rental."

1. Administrative Procedure: Hearings -- Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911

   Under 43 CFR 2802.1-7(e) (1979), which provided that charges for use and occupancy of a communication site on public lands may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Act of March 4, 1911

   Where an easement for a right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and was not conformed to a Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), right-of-way in accordance with sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), 43 CFR 2803.1-2(d), allowing rental adjustment without a prior hearing, is not applicable because such a pre-FLPMA easement for a right-of-way was not issued pursuant to Title V of FLPMA.

APPEARANCES: Richard A. Bromley, Esq., San Francisco, California, for the appellant; James E. Turner, Esq., Office of the Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

American Telephone and Telegraph Company has appealed from decisions of the Nevada and Wyoming State Offices, Bureau of Land Management (BLM), dated November 17, 19, and 20, 1980, and December 19, 1980, imposing reappraised annual rental charges for communication site rights-of-way. 1/ The rights-of-way were granted to appellant pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976). 2/

In its statements of reasons for appeal, appellant contends that it was entitled to a hearing prior to the imposition of reappraised annual rental charges pursuant to 43 CFR 2802.1-7(e)(1979) and that the appraisals, upon which the revised rental charges were based, were "inadequate."

The regulation relied on by appellant, 43 CFR 2802.1-7(e) (1979), provided:

> At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

In American Telephone and Telegraph Co., 25 IBLA 341, 346-47 (1976), we held that the requirement of a hearing prior to the imposition of revised rental charges is mandatory, stating:

1/

	Rights-of-Way Nos.	Date of Grant
IBLA 81-215	N-023456 (Search Light)	March 31, 1955
	N-053733 (Mormon Mesa)	March 22, 1960
	N-053746 (Arrow Canyon)	March 22, 1960
	N-053815 (Beer Bottle)	March 22, 1960
	N-057098 (Wildhorse)	May 11, 1961
IBLA 81-217	W-21799 (Fontenelle)	May 19, 1970
IBLA 81-221	N-057071 (Stillwater)	May 11, 1961
IBLA 81-259	N-057424 (Wendover)	May 22, 1960

2/ This Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976), effective Oct. 21, 1976, subject to valid existing rights.

> As to the revised charges for the Wyoming, Arizona and Washington sites listed in Appendix II, we note that no hearings were held as required in section 2802.1-7(e), supra. That regulation requires notice and an opportunity for hearing as a matter of right prior to revision of charges. A specific requirement that a hearing be held before government action is taken is mandatory. Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961). In Texas Gas Transmission Corporation, A-29856 (January 14, 1964), the regulation herein concerned -- formerly designated 43 CFR 244.21(e) (1963) -- was construed by the Department: "Since the regulation plainly requires that these steps [notice and opportunity for hearing] be taken before rates are changed, it was improper to act without following the prescribed procedures." The decisions as to sites in Wyoming, Arizona and Washington must therefore be set aside and the cases remanded for opportunity for hearing as set forth hereunder prior to imposition of revised charges. [Footnote omitted.]

Appellant argues that 43 CFR 2802.1-7(e) (1979) is controlling in the present cases.

BLM, however, asserts that the applicable regulation is 43 CFR 2803.1-2(d) which was published in the Federal Register on July 1, 1980, 43 FR 44533, with an effective date of July 31, 1980. That regulation provides:

> Rental fees may be initiated or adjusted whenever necessary to reflect current fair market value: (1) As a result of reappraisal of fair market values which shall occur at least once every 5 years, or (2) as a result of a change in the holder's qualifications under paragraph (c) of this section. Reasonable notice shall be given prior to imposing or adjusting rental fees pursuant to this paragraph. Decisions on fees are subject to appeal pursuant to § 2804 of this title.

BLM argues that this "procedural" regulation should be applied retroactively to appellant's rights-of-way and that doing so does not result in "substantial prejudice," especially where appellant may request a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415 on appeal to the Board.

[1, 2] We are well aware that administrative regulations may be applied retroactively. See Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360, 364-65 (1981); Kin-Ark Corp., 45 IBLA 159 (1980). However, in determining whether retroactive application is proper the

intent of the agency is an initial consideration. Penasco Valley Telephone Cooperative, Inc., supra at 364-65. In James W. Smith (On Reconsideration), 55 IBLA 390 (1981), we considered whether the July 1980 regulations, 43 CFR Part 2800, were applicable to pre-FLPMA rights-of-way. We stated:

> When the FLPMA right-of-way regulations, 43 CFR Part 2800, are examined, the interpretation that pre-FLPMA rights-of-way are not governed by such regulations is clear. 43 CFR 2800.0-5(g) defines "right-of-way" as "the public lands authorized to be used or occupied pursuant to a right-of-way grant." "Right-of-way grant" is defined in 43 CFR 2800.0-5(h) as "an instrument issued pursuant to Title V of the Act authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project." (Emphasis added.) The term right-of-way grant is used throughout the regulations in 43 CFR Part 2800, thereby limiting the application of the regulations to instruments "issued pursuant to Title V of the Act."

Id. at 396.

The regulations applicable to rental fees, 43 CFR 2803.1-2, in general apply to "[t]he holder of a right-of-way grant or temporary use permit * * *." 43 CFR 2803.1-2(a). As explained above, a right-of-way grant is an instrument issued pursuant to Title V of FLPMA. Therefore, since the rights-of-way in question were issued prior to FLPMA, 43 CFR 2803.1-2(d) is not applicable, and appellant is entitled to the opportunity for a prior hearing pursuant to 43 CFR 2802.1-7(e) (1979). 3/ In accordance with our decision in American Telephone and Telegraph Co., supra at 358-59, we refer these cases to the Hearings Division and order that the hearing or hearings in these cases be conducted by an Administrative Law Judge "in accordance with §§ 4.430 to 4.439, and the general rules in Subpart B of this part." 43 CFR 4.415. 4/ The Administrative Law Judge should present proposed findings of fact to the

3/ There is no evidence in the records in these appeals to indicate that any of these rights-of-way have been conformed to FLPMA rights-of-way pursuant to section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976).

4/ Appellant requests that a hearing be postponed until a decision is rendered in the case of American Telephone and Telegraph Co., supra. That case is presently before BLM as a result of the Board's referral to the Hearings Division. A hearing was subsequently held by Administrative Law Judge E. Kendall Clarke, who issued proposed findings of fact pursuant to our decision in American Telephone and Telegraph Co., supra. Appellant bases this request on the similarity of "issues." Since these cases are being referred to the Hearings Division, appellant's request for a postponement of any hearing would best be addressed

Director, BLM, or to the authorized officer designated by the Director, who will then establish any revised rental charges reasonable and proper under the regulations. 5/

There is one final matter. One of the decisions docketed under IBLA 81-215, pertaining to right-of-way N-057098, indicated that a reappraisal had been conducted and that rental was determined to be $450 annually commencing on January 1, 1981; however, the decision required the payment of "[b]ack rental" for the years 1973-80 in the amount of $10,280 ($1,285 per year). Appellant argues that the BLM decision increasing the rental charge from $60 per year to $1,285 per year was "expressly set aside by the IBLA in its Decision of July 1, 1976." In an order dated July 1, 1976, we set aside a June 20, 1973, BLM decision imposing a revised rental charge of $1,285 per year on right-of-way N-057098 for a 5-year period. This action was taken pursuant to a request by BLM asserting that the rental charges had been improperly determined. BLM's request for back rental for right-of-way N-057098 in the amount of $10,280 ($1,285 per year) was clearly improper. The proper approach is that taken with respect to the other right-of-way involved in the Board's June 20, 1973, order, N-057071, which had its rental charge increased from $80 per year to $1,285 per year. In the decision docketed under IBLA 81-221, pertaining to right-of-way N-057071, BLM required the payment of back rental for the years 1973-1980 in the amount of $640 ($80 per year). This amount has been paid by appellant. Therefore, appellant is ordered to pay BLM back rental for the years 1973-80 with respect to right-of-way N-057098 in the amount of $480 ($60 per year) within 30 days of receipt of this decision. See generally Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978).

Given our disposition of these appeals, there is no need to reach the question raised by appellant concerning the adequacy of BLM's appraisals.

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fn. 4 (continued)
to the Administrative Law Judge assigned to the case. Appellant also requests consolidation of these four appeals. For the purposes of this decision, we have chosen to consolidate based on the similarity of legal issues. BLM argues that consolidation will present certain practical problems "[i]n the event a hearing is ordered," namely, "current travel restrictions would render it difficult and impractical to attempt to have the relevant witnesses at one hearing." BLM "foresees that it might have to seek a severance at a later date in order to properly present its case at a trial." Again, this is a matter more appropriately decided by the Administrative Law Judge.

5/ The Director, BLM, or the authorized officer designated by the Director, BLM, is specified by the Board to receive the record and proposed findings for the Board under 43 CFR 4.439. The Board will reserve its review of the matter until receipt of any further appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge to provide an opportunity for a hearing prior to imposition of any revised rental charges by BLM. Appellant is ordered to pay back rental in the amount of $480 for right-of-way N-057098 within 30 days of receipt of this decision.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge